

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROMAN SELEZNEV,

Defendant.

No. CR 11-70RAJ

DEFENSE MOTIONS IN LIMINE

NOTING ON MOTION CALENDAR:  
August 3, 2016

**I. INTRODUCTION**

The defendant, Roman Seleznev, by and through his counsel, John Henry Browne and Emma C. Scanlan, respectfully requests that the Court issue an order granting the following motions *in limine*.

**II. MOTIONS**

**A. Scope of Cross-Examination and Effective Assistance of Counsel**

On December 19, 2014, Mr. Seleznev and his former counsel met with the government's representatives for an interview. An agreement governing the potential use of Mr. Seleznev's statements made during the interview was signed by Mr. Seleznev and his counsel. The provision of the agreement restricting Mr. Seleznev's counsel from presenting a position at trial "materially inconsistent" from Mr. Seleznev's statements at the interview was later challenged by Mr. Seleznev's subsequent counsel. Dkt. # 250. Specifically, the defense challenged whether Mr. Seleznev knowingly agreed that if his counsel took a "position materially inconsistent with" his admissions that his admissions may be used against" him at trial. Dkt. # 270-1, p. 2-3.

1 In an Order entered on April 29, 2016, the Court ruled that “the defendant  
2 understood he, personally, could not testify inconsistently with his” admissions, “but he  
3 was unaware the same limitation applied to his attorneys.” Dkt. # 327, p. 6. For this  
4 reason, “the defendant’s” admissions “may be used for impeachment purposes only” at  
trial. Dkt. # 327, p. 7.

5 The Court, however, also held that: defense “counsel will not be permitted to  
6 elicit substantive, non-impeachment testimony, either on cross-examination of witnesses  
7 called by the government or from witnesses called to testify on behalf of the defendant or  
8 to present arguments to the jury at any stage of the proceedings that directly contradict  
specific factual statements made by the defendant” during the interview. Dkt. #327 at 7.  
9 This limitation has the same effect on counsel’s ability to effectively represent Mr.  
Seleznev as Mr. Seleznev’s waiver that the Court found was unknowing.

10 By limiting counsel’s ability to elicit substantive testimony that contradicts factual  
11 statements made by Mr. Seleznev during the interview, it appears that the Court is  
12 “essentially muzzling counsel and rendering counsel ineffective during trial.” Dkt. # 327,  
p. 6, quoting United States v. Burnett, 2009 WL 2180373, at 3 (E.D. Pa. July 17, 2009).  
13 “Whether rooted directly in the Due Process Clause of the Fourteen Amendment, or in  
14 Compulsory Process of Confrontation clauses of the Sixth Amendment, the Constitution  
15 guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”  
16 Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citations omitted). This includes  
the rights to present testimony in one’s defense and confront and cross-examine adverse  
17 witnesses. See, e.g., Chambers v. Mississippi, 410 U.S. 284; (1973); Davis v. Alaska,  
18 415 U.S. 308; (1973); Washington v. Texas, 388 U.S. 14 (1967). An individual must be  
afforded a meaningful right to be heard, which includes the right to present a defense.  
19 See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

20 The defense seeks guidance from the Court as to whether counsel will be able to  
21 call into question the government’s ability to prove facts previously admitted by Mr.  
22 Seleznev. In order to effectively represent Mr. Seleznev defense counsel needs to be able  
23 to confront the government’s witnesses and elicit substantive testimony that calls into  
24 doubt the government’s ability to prove a number of the facts admitted by Mr. Seleznev  
during the interview.

Specifically, the defense requests permission to elicit substantive testimony and make arguments regarding the following issues:

<b>Fact</b>	<b>Proposed Testimony and/or Argument</b>
Admitted during interview: Mr. Seleznev used all of the “nics” listed in the indictment with the exception of “bandysli64.”	Questions and argument contradicting the government’s ability to prove that Mr. Seleznev used any or all of the nics attributed to him. For example, questions on cross-examination regarding whether agents can physically tie Mr. Seleznev to the keyboard at the time someone using the HopOne server logged on to carder.biz using the nic “bulba.”
Connection between Mr. Seleznev and dump shop servers and websites bearing the names of nics Mr. Seleznev admitted using: Track2, bulba, 2pac, etc.	Cross-examination, testimony and argument contradicting Mr. Seleznev’s connection to the relevant dump servers and websites. For example, eliciting testimony that 2pac.cc had continuing activity after Mr. Seleznev’s arrest thereby contradicting Mr. Seleznev’s admission that he was the one using the nic 2pac.
“Smaus” and “shmak” are nics listed in the Second Superseding Indictment that Mr. Seleznev made factual admissions about during the interview. “smaus.fvds.ru” and “shmak.fvds.ru” are the website addresses of malware servers.	Cross-examination and argument questioning the link between Mr. Seleznev and the malware servers.
Use of name “Roman Ivanov.” Does not appear to be part of factual admissions made during the interview.	Questions and argument contradicting the government’s ability to prove that Mr. Seleznev used the alias “Roman Ivanov.”
Use of name “Ruben Samvelich.” Does not appear to be part of factual admission made during the interview.	Questions and argument contradicting the government’s ability to prove that Mr. Seleznev used the alias “Ruben Samvelich.”
Use of boookscafe@yahoo.com email address.	Questions and argument contradicting the government’s ability to prove that Mr. Seleznev used the email address “boookscafe@yahoo.com.”
Use of sendspace. Mr. Seleznev admitted during the interview that he used sendspace to send “dumps” to clients.	Questions and argument calling into question Mr. Seleznev’s connection to the use of sendspace to transmit credit card numbers from the Broadway Grill point-of-sale (“POS”) system to an outside server.
During the interview Mr. Seleznev admitted creating “pack.exe.”	Questions and argument challenging the attribution of pack.exe to Mr. Seleznev.

Fact	Proposed Testimony and/or Argument
During the interview Mr. Seleznev admitted targeting POS systems supported by the company Firefly because Firefly used the same password for all the systems it supported.	Questions and argument challenging whether Mr. Seleznev was the one targeting all of the named victim Firefly supported businesses as opposed to others with the same knowledge regarding the weaknesses in Firefly supported POS systems.

In addition to the topics listed above there will certainly be other issues that come up at trial. With the Court's permission, counsel will make an offer of proof regarding other topic areas prior to eliciting substantive testimony if counsel believes there may be a question as to whether there was a relevant factual admission made by Mr. Seleznev during the interview.

#### **B. Government's Proposed Summary Exhibits**

The admissibility of summary exhibits is guided by Federal Rule of Evidence 1006, which provides: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." See United States v. Rizk, 660 F.3d 1125, 1130 (9th Cir. 2011) (citations omitted). The purpose of the rule is "to allow the use of summaries when the documents are unmanageable or when the summaries would be useful to the judge and jury." Id. The proponent of summary evidence must establish that the underlying materials upon which the summary is based (1) are admissible and (2) were made available to the opposing party for inspection. Id. While the materials must be admissible, they do not need to be admitted into evidence. Id. "Receiving summary exhibits of material already in evidence," however, is disfavored. United States v. Anekwu, 695 F.3d 967, 982 (9th Cir. 2012).

##### **1. Proposed Summary Exhibit 1.15**

Government proposed summary exhibit 1.15 titled "Malware Installation and Mitigation Summary" is a recapitulation of information contained in nine other proposed exhibits labeled 1.1 through 1.9. Each of the underlying exhibits is two pages. Thus, the summary covers only 18 pages of records. To be clear, these are not 18 pages of dense data; rather the pages are charts of easily readable and accessible information. As this is

1 not the kind of information contemplated by Rule 1006, the government should not be  
2 allowed to offer proposed summary exhibit 1.15 as substantive evidence.

3 2. Proposed Summary Exhibit 4.12

4 Proposed Summary Exhibit 4.12 lists five: domain names, the domains' registrars  
5 and creation dates, name associated with the domain name, registered email address, and  
6 phone number. This is information easily explained to the jury from the source  
7 documents for each domain. Each domain has an associated "Domain Tools" report  
8 which sets forth the relevant information in an easy to understand and relatively brief  
9 format. The compilation is not necessary and the underlying documents can  
10 "conveniently be examined" by the jury. Fed. R. Evid. 1006. The summary chart should  
11 not be admitted as substantive evidence.

12 3. Proposed Summary Exhibit 4.14

13 Proposed summary exhibit 4.14 is a three-line chart summarizing information  
14 available in government exhibits 4.1 – 4.3. Exhibits 4.1, 4.2 and 4.3 are themselves  
15 summary reports by "Domain Tools." The reports are short and easy to understand.  
16 While the proffered summary exhibit shows that the three domains at issue were  
17 registered at the same time and in the same name, something the government would no  
18 doubt benefit from demonstrating, this exhibit is a far cry from what is contemplated by  
19 Federal Rule of Evidence 1006. This exhibit does not condense information from  
20 voluminous records; all it does it highlight a similarity that is beneficial to the  
21 government's case. Exhibit 4.14 should not be allowed as substantive evidence.

22 4. Proposed Summary Exhibits 9.11

23 The government has provided two different summary exhibits 9.11. The first is a  
24 seven-page document summarizing information available in government exhibits 9.1 –  
25 9.5, 9.7 – 9.9, and 9.12 – 9.26. The second is a single page summary of the seven-page  
26 summary. Exhibits 9.1 – 9.5, 9.7 – 9.9, and 9.12 – 9.26, in turn, relate to eight different  
27 Liberty Reserve Accounts, their registration records, transaction histories, and user IP  
28 addresses. These source documents are easy to comprehend, are not overly voluminous,  
29 and should pose no difficulty for the jury. The summary—and the summary of the  
30 summary— should not be admitted under Federal Rule of Evidence 1006.

1           5.       Proposed Summary Exhibit 13.30

2           Proposed Summary Exhibit 13.30 is merely a list of search terms from Mr.  
3       Seleznnev's laptop that the government seeks to highlight. This is clear even in the name  
4       of the exhibit: Summary of Parsed Search Terms from Laptop. This is a comment on the  
5       evidence rather than a proper summary seems, at best, to constitute demonstrative  
6       evidence which can "conveniently be examined in court."

6           6.       Proposed Summary Exhibit 13.31

7           Proposed Summary Exhibit 13.31 is another cherry-picked list of terms from Mr.  
8       Seleznnev's use of Firefox on his laptop that the government seeks to highlight. This is  
9       not the type of evidence contemplated by FRE 1006; rather, it is another comment on the  
10       evidence as well as material that can conveniently be examined in court.

10          7.       Proposed Summary Exhibit 13.40

11          Proposed Summary Exhibit 13.40 merely identifies and provides creation, last  
12       access, and last written dates for all of the government's proposed exhibits in the 13-  
13       range. This list is, again, very selective and not actually a proper summary. As this  
14       exhibit amounts to a comment on the evidence and simply what the government wants to  
15       highlight, it is inadmissible.

14          8.       Proposed Summary Exhibit 16.14

15          Proposed Summary Exhibit 16.14 is a two-page summary of travel dates ranging  
16       from February 4, 2010 through July 5, 2014 as shown on Mr. Seleznnev's passport. Mr.  
17       Seleznnev's international passport, though, is government exhibit 12.7; photos from his  
18       passport are government exhibit 12.7(a), and a translation of his passport is government  
19       exhibit 12.7(b). The jury, more importantly, is perfectly capable of viewing and  
20       assessing a passport. As the materials the government seeks to summarize will already be  
21       in evidence, are not voluminous, and are readily understandable to the jury, the proposed  
22       summary is inadmissible.

21       **C.       Potential Testimony of Svetlana Zharova**

22       Ms. Zhavora was interviewed by government agents on several occasions and has  
23       testified before the Grand Jury in this case. Based on a review of the statements made,  
24       portions of Ms. Zharova's potential testimony should be excluded under the martial  
     communications privilege, because they are hearsay without exception or because the

1 prejudice to Mr. Seleznev of introducing the statement outweighs the probative value.  
2 Fed.R.Evid. 403.

3 1. Marital Communications

4 Private communications between spouses “are generally assumed to have been  
5 intended to be confidential” and are thus privileged. United States v. Montgomery, 384  
6 F.3d 1050, 1056 (9th Cir. 2004) (quoting Wolfe v. United States, 291 U.S. 7, 14, 54  
7 S.Ct. 279 (1934)); United States v. Marashi, 913 F.2d 724, 729–30 (9th Cir.1990).  
8 (Communications made outside the presence of others during a valid marriage are  
9 privileged.) The marital communications privilege may be invoked by the non-testifying  
10 spouse. United States v. Banks, 556 F.3d 967, 974 (9th Cir. 2009).

11 Based on information garnered from Ms. Zharova’s interviews and prior  
12 testimony, the following communication allegedly made by Mr. Seleznev to Ms. Zharova  
13 are privileged: (1) he told her he was an independent contractor; (2) he told her he  
14 worked on anti-virus programs; (3) he told her Vladimir Horohorin’s arrest had  
15 something to do with their contract and was a secret; (4) he told her he and Vlad became  
16 competitors; (5) he told her he paid someone to block Vlad’s advertising; (6) he told her  
17 about Vlad and Anton; (7) he told her he shared too much information about his business  
18 with his former girlfriend and would not make the same mistake with her; (8) he told her  
19 that Anton knew too much about the business; (9) after their apartment in Vladivostok  
20 was robbed, he told her not to return to their apartment because the burglars might also  
21 head there; (10) he told her to rent a car to pick him up at the airport and told her they  
22 were moving to Bali because it was dangerous to stay in Russia, he knew secrets, and he  
23 had a high paying job; (11) he told her he had to pay for protection in Russia; (12) he told  
24 her that when he changed nicknames he lost prestige and respect online; (13) he told her  
about dumps, Vlad, Valery, websites, and how numbers were very important; (14) he told  
her he could not travel to the United States or to any of its allies; (15) he told her that  
Shmak was one of his nicknames; and (16) he told her about a bulletproof computer.

The defense suggests that the Court require the government to make an offer of  
proof regarding the situation and context for each alleged statement by Mr. Seleznev to  
Ms. Zharova or statement by Ms. Zharova to Mr. Seleznev that it intends to elicit at trial.



1           2.     Hearsay

2           The following statements are hearsay without exception and should be excluded:  
 3           (1) allegations involving alleged threats or other communications with or by Mr.  
 4           Seleznev's father, Valery Seleznev; (2) the police told Ms. Zharova that they arrested Mr.  
 5           Seleznev and Andrei for robbing Ms. Zharova's apartment; (3) Anton allegedly told Ms.  
 6           Zharova about some aspects of Mr. Seleznev's business; (4) Anton said that "NCUX" fit  
 7           Mr. Seleznev's personality because it meant an unstable personality; (5) she heard Mr.  
 8           Seleznev's friends call him "seek"; and (6) Ms. Zharova heard "track2" and bulba.

9           3.     Prejudice Outweighs Probative Value

10          The probative value of the following area of testimony is outweighed by the  
 11          prejudice to Mr. Seleznev should the Court allow Ms. Zharova to testify regarding these  
 12          matters: (1) Mr. Seleznev's alleged arrested in Russia for drunk driving; (2) Ms.  
 13          Zharova's opinion that Mr. Seleznev broke into her apartment; (3) Ms. Zharova's opinion  
 14          that Mr. Seleznev was angry with her after the bombing; (4) details of the marital  
 15          relationship; (5) alleged threats by Valery Seleznev or his associates; (6) opinions about  
 16          the relationship between Mr. Seleznev and his father; and (7) Ms. Zharova's opinion that  
 17          Mr. Seleznev's father was trying to help him become a member of the Duma; and Ms.  
 18          Zharova's allegation that she left Russia due to concerns for her safety.

19         **D.     Expert Testimony**

20           1.     Profile Evidence

21          The government has endorsed United States Secret Service ("USSS") Agent  
 22          Matthew O'Neill to discuss "carding," "payment systems," "internet tools," and  
 23          unauthorized access." Apparently Agent O'Neill would testify generally that  
 24          cybercriminals: use credit card data and personal identification information to further  
 25          their schemes; use forums, which have their own hierarchies to discuss their common  
 26          interests; use numerous methods to conceal, store, transfer, and launder their monies;  
 27          often conceal their activities by using proxy servers, virtual private networks, virtual  
 28          machines, foreign websites and email addresses, and false identities. O'Neill also intends  
 29          to discuss techniques commonly used by hackers and how cybercriminals use malware.

30          This type of generalized profile testimony carries with it the implied opinion that  
 31          the defendant is the type of person who would engage in the alleged illegal acts and



1 therefore must have committed such acts. See, e.g., United States v. Gillespie, 852 F.2d  
 2 475, 480 (9th Cir.1988) (“testimony of criminal profiles is highly undesirable as  
 3 substantive evidence because it is of low probativity and inherently prejudicial”).

4 In this particular case, any such testimony is likely to include descriptions of the  
 5 conduct of individuals who were found guilty of related offenses involving computer  
 6 hacking, which will nicely dovetail with the allegations against Mr. Seleznev, and thus  
 7 invite the jury to—unfairly—infer that he must be guilty.

8 General testimony about computer hacking, moreover, may include an implied  
 9 opinion on the defendant’s mental state (i.e, his intent to defraud). Rule 704 provides that  
 10 no witness may state an expert opinion or inference regarding whether a defendant  
 11 possesses a particular mental state that is an element of the crime charged. Fed.R.Evid.  
 12 704(b); see United States v. Campos, 217 F.3d 707, 717-19 (9th Cir. 2000) (citing United  
States v. Wang, 49 F.3d 502, 504 (9th Cir. 1995) (“we now make explicit, the better  
 practice would be for the prosecutor not to ask ... questions arguably bearing on intent  
 and for a district court not to find such answers admissible”).

13 The proposed testimony, finally, is neither relevant to the charges nor helpful to  
 14 the trier of fact. Fed.R.Evid. 401; 702; Daubert v. Merrell Dow Pharmaceuticals, Inc.,  
 15 509 U.S. 579, 113 S.Ct. 2786 (1993). It is also subjective and conclusory and thus cannot  
 16 be challenged in an objective manner. See Daubert, supra; Kumho Tire Co. v.  
Carmichael, 526 U.S. 137, 147, 119 S.Ct. 1167 (1999).

## 17 2. Hybrid Fact and Expert Witnesses

18 The government has indicated that it will offer expert opinion testimony from  
 19 members of law enforcement who will also present factual testimony. These hybrid  
 20 witnesses include: Seattle Police Department (“SPD”) Officer David Dunn; USSS Agent  
 21 David Mills; USSS Agent Michael Fischlin; SPD Officer Christopher Hansen; and USSS  
 22 Agent John Szydluk. If the government calls any of these witnesses—or any other  
 member of law enforcement—as both a fact witness and an expert witness, the defense  
 requests that this Court institute the special procedures delineated by United States v.  
Freeman, 598 F.3d 893 (9th Cir. 2007) and its progeny.

23 As the Court in United States v. Vera summarized: “[A]n agent’s status as an  
 24 expert could lend him unmerited credibility when testifying as a percipient witness,

1 cross-examination might be inhibited, jurors could be confused and the agent might be  
2 more likely to stray from reliable methodology and rely on hearsay.” 770 F.3d 1232,  
1242 (9th Cir. 2014).

3 In Freeman, despite its concerns, the Court sanctioned the use of case agents as  
4 both expert and lay witnesses, but warned that it is necessary to make clear to the jury the  
5 circumstances permitting the agent to testify as an expert and clearly delineate the  
6 witness’s dual roles. 598 F.3d at 904. Otherwise “expert testimony by a fact witness the  
7 testimony as a whole—and not just the expert segment—may have the “imprimatur of  
scientific or technical validity.” Id. at 903-04 (citations omitted).

8 Both Vera and the more recently decided United States v. Torralba-Mendia, 784  
9 F.3d 652 (9th Cir. 2015), involved instructional errors in failing to advise the respective  
10 juries as to how to properly assess an officer’s lay and expert testimony. As the Vera  
11 Court, again, aptly noted: expert opinions from otherwise lay witnesses “must rest on  
12 reliable methodology ... may not be supported by speculation or hearsay, or interpret  
unambiguous, clear statements; and that the jury must be instructed on how to  
13 appropriately evaluate each form of testimony offered by the officer.” 770 F.3d at 1235.  
14 Members of law enforcement may thus “offer lay and expert opinions ... but the  
15 foundation laid for those opinions must satisfy Rules 701 and 702. Further, if a single  
officer offers both lay and expert testimony, the jury must be informed of the fact and  
16 significance of his dual roles.” Id. at 1243.

17 a. Detective Dunn

18 Detective Dunn exemplifies the dangers of permitting a case agent to testify as an  
19 expert witness. The government has disclosed that it intends to have Detective Dunn  
testify generally about the same topics as Agent O’Neill—computers, carding, payment  
20 systems, internet tools, unauthorized access. This is clearly cumulative.

21 In addition to generalized testimony about what computer hackers do, the  
22 government has disclosed that it intends to have Detective Dunn testify about malware  
and how it was allegedly used in this case. He will offer the opinion that “RAM scraper”  
23 malware stole credit card information in the few moments it existed on RAM in an  
unencrypted state, prior to its storage in an encrypted state after usage. He will talk about  
24

1 the various computers he examined, the Hop One server, and how the data stored on the  
2 server can be connected to Mr. Seleznev.

3 The government has also endorsed Dunn to discuss email, generally, as an expert,  
4 but also emails discovered by the government and business records from online vendors  
5 as a lay witness. Finally, he will testify about Whois domain registration and opine that  
6 cybercriminals often falsify registration data to obscure their identities and techniques.

7 Under Rule 704(b), though, an “expert witness may not state an opinion as to  
8 whether the defendant did or did not have the mental state or condition constituting an  
9 element of the crime or a defense thereto. An expert witness is not permitted to offer a  
10 direct opinion on the defendant's guilt or innocence.” United States v. Anchrum, 590 F.3d  
11 795, 804 (9th Cir. 2009) (citations omitted). There seems an overwhelming danger that if  
12 Detective Dunn is allowed to testify as a hybrid witness without restraint he will be able  
13 to describe what hackers do and then go on to say exactly what he thinks Mr. Seleznev  
14 did that fits the profile of hacker activities he previously outlined.

15 b. Agent Mills

16 The government endorses Agent Mills to testify generally about carding and  
17 forensic analysis and specifically about his forensic review of the Sony Vaio laptop.  
18 Agent Mills will then, apparently, switch to testifying as a lay witnesses and offer  
19 testimony regarding the evidence of carding he found on the computer.

20 The government intends Mills to, based on his training and experience, provide  
21 his understanding of slang words allegedly used by Mr. Seleznev and others. It is unclear  
22 whether Agent Mills possesses enough experience to testify on this topic as an expert.  
23 He has been doing electronic forensic work since 2012 but it is unclear how much  
24 experience he has with the slang words he is purportedly going to testify about.

c. Agent Szydlik

25 The government offers Agent Szydlik to testify, based upon his training and  
26 experience, about various payment systems cybercriminals allegedly used to transfer and  
27 launder money. He will more thoroughly discuss the Liberty Reserve investigation and  
28 connect that investigation to Mr. Seleznev.

29 Agent Szydlik will also offer lay testimony about his investigation of Mr.  
30 Seleznev, but at the same time reference previously provided expert testimony.

Here, then, Mr. Seleznev requests that should the Court qualify any fact witnesses as experts, in order to minimize the inherent prejudice, that the Court: (1) “clearly separate” the testimony into two phases—the first consisting of lay observations and the second consisting of expert opinion; (2) “require an adequately specific foundation, so that the jury has the information needed” to evaluate the testimony; (3) instruct the jury as to “what the attendant circumstances are in allowing a government case agent to testify as an expert”; and (4) prohibit an officer to “testify based on speculation, rely on hearsay, or interpret unambiguous, clear statements. Torralba-Mendia, 784 F.3d at 658 (citations omitted).

#### **E. Law Enforcement Opinion Testimony**

A number of the investigative reports attribute specific actions to Mr. Seleznev based on the agent’s opinion that Mr. Seleznev is the person who, for example, received a particular email at boookscafe@yahoo.com. While this type of attribution poses no problem during the investigatory stage, it is a problem when the attribution of specific acts to Mr. Seleznev bleeds into the testimony at trial.

It is axiomatic that “[a] witness is not permitted to give a direct opinion about the defendant’s guilt or innocence.” Moses v. Payne, 555 F.3d 742, 761 (1998) (quoting United States v. Lockett, 919 F.2d 585, 590 (9th Cir.1990); citing also Fed.R.Evid. 704(a)); see, e.g., Gibson v. United States, 363 F.2d 146, 147 (5th Cir. 1966) (no witness may testify as to his or her own opinion as to the guilt of a defendant)). More specifically, it is “error to allow law enforcement witnesses to express opinions as to defendants’ culpability based on the totality of information gathered in the course of their investigations.” United States v. Garcia, 413 F.3d 201, 211 (2d Cir. 2005) (citing United States v. Grinage, 390 F.3d 746, 749–51 (2d Cir. 2004) (rejecting receipt of such evidence as lay opinion under Rule 701); United States v. Dukagjini, 326 F.3d 45, 54 (2d Cir. 2003) (rejecting receipt of such evidence as expert opinion under Rule 702). The Garcia Court explicitly rejected the government’s argument that “a case agent may offer, at the beginning of a trial, a lay opinion providing a summary overview of anticipated evidence.” Id. The defense requests that the Court prohibit the government’s witnesses from attributing things like the installation of a particular piece of malware onto a specific POS system to Mr. Seleznev as such testimony invades the province of the jury.

1 This case comes down to whether the jury believes the government has proved beyond a  
 2 reasonable doubt that Mr. Seleznev was the person who infiltrated the POS systems  
 3 described in the Indictment as opposed to someone else. The agents should not be  
 4 allowed to offer an opinion on this ultimate issue.

#### 4 **F. FDC Calls**

5 The government has not listed any of Mr. Seleznev's phone calls while he has  
 6 been at the Federal Detention Center on its exhibit list. Should the government intend to  
 7 introduce any of the calls the defense requests notice of those calls prior to the pretrial  
 8 conference.

#### 8 **G. Pending Charges in Nevada and Georgia**

9 The government assured the Court and the defense that it will not offer any  
 10 evidence stemming from Mr. Seleznev's pending cases in the District of Nevada and the  
 11 Southern District of Georgia. With this assure, all evidence regarding those charges and  
 12 stemming from those cases should be excluded.

#### 12 **H. Exclusion of Witnesses**

13 Pursuant to Federal Rule of Evidence 615, the defense moves to exclude  
 14 witnesses from the trial prior to their testimony so that they cannot hear the testimony of  
 15 other witnesses. See, e.g., Geders v. United States, 425 U.S. 80, 88, 96 S.Ct. 1330 (1976)  
 16 (finding that sequestration of non-party witnesses "exercises a restraint on witnesses  
 17 'tailoring' their testimony to that of earlier witnesses" and "aids in detecting testimony  
 18 that is less than candid") (citing 6 J. Wigmore, Evidence § 1838 (3d ed. 1940); F.  
 19 Wharton, Criminal Evidence § 405 (C. Torcia ed. 1972)).

#### 18 **I. Witnesses Discussing the Case**

19 The defense requests that the Court prohibit the witnesses involved in this case  
 20 from discussing testimony, evidence, or other courtroom matters with other witnesses in  
 21 this case, and instruct the government to not disclose any testimony to witnesses who  
 22 have yet to testify. See, e.g., United States v. Buchanan, 787 F.2d 477, 484-85 (10th Cir.  
 23 1986) (determining that prohibiting witnesses from discussing their testimony amongst  
 24 themselves is "necessary to prevent a circumvention" of Rule 615); United States v.  
Johnston, 578 F.2d 1352, 1355 (10th Cir. 1978).

1 **J. Advance Notice of Witness Order**

2 In order to ensure that the trial proceeds smoothly and that all parties are  
3 prepared, the defense requests that the Court order the government to provide 48 hours  
4 advance notice of the order of witnesses.

5 **III. CONCLUSION**

6 The defense submits these motions *in limine* to apprise the Court of anticipated  
7 substantive areas of law likely to be at issue in this case, and respectfully requests that the  
8 Court grant the relief requested.

9 DATED this 18th day of July, 2016.

10 Respectfully submitted,

11 s/ John Henry Browne

12 JOHN HENRY BROWNE, WSBA #4677

13 s/ Emma C. Scanlan

14 EMMA C. SCANLAN, WSBA #37835

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all registered parties.

*s/Emma C. Scanlan*

Emma C. Scanlan, WSBA #37835